No. 9561.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT 9

First Presbyterian Church of Santa Barbara, California, a Religious Corporation,

Appellant,

vs.

M. L. Rabbitt, as Trustee in Bankruptcy of the Bankrupt Estate of James Marwick, and James Marwick,

Respondents and Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

STATEMENT OF FACTS.

This brief is filed on behalf of M. L. Rabbitt as trustee in bankruptcy of the bankrupt estate of James Marwick, who will hereinafter be referred to as the "appellee", or "respondent". Although James Marwick is nominally an appellee, he is not an actual party to this appeal, and will be referred to as "Marwick".

Appellee accepts the Statement of Pleadings and Jurisdiction of appellant. The Statement of Facts of appellant is substantially correct except as to the statement that the trial court "determined that the deed was a construc-

tively fradulent but not an actually fraudulent transfer". The court specifically found that the deed was given and received with intent to hinder, delay and defraud the creditors of Marwick. This point will be developed further at a later place in this brief.

Defendant's Exhibit B appearing in the transcript at page 80 has been variously referred to all through these proceedings as "deed of trust", "trust indenture" and "declaration of trust", due to the fact that the document itself bears no title. It should be borne in mind, therefore, that the same document is under consideration wherever these various designations appear.

ARGUMENT.

I.

The Finding of the Court That There Was No Consideration for the Trust Indenture Was Amply Supported by the Evidence.

The foregoing point is in response to Subdivision I of appellant's argument.

A. It was stipulated that no consideration was given for the transfer involved herein except for the recitations contained in the trust indenture (Defendant's Exhibit B) and the deed (Plaintiff's Exhibit 2) (Appellant's Statement of Facts, App. Op. Br. p. 5).

As indicated by appellant's argument, the only evidence relied upon by appellant to show consideration is the oral testimony of George W. Wilson and the statements

contained in the declaration of trust. To determine the theory upon which this case was tried as to this issue, brief consideration should be given to the pleadings. Paragraph III of plaintiff's First Cause of Action alleges that Marwick owned the real property involved in this action at all times to and including on or about March 30, 1932 (the approximate date of the deed). Paragraph IV alleges that on or about the said date, the transfer in question was made without consideration. In answer to these allegations [Tr. pp. 13, 14 and 15] the appellant herein alleges that on or about November 28, 1927, Marwick entered into a subscription agreement wherein he agreed to pay to appellant the sum of $25,000.00 "for the reconstruction of the house of worship of said answering defendant for and in consideration of the promises of certain other members of said First Presbyterian Church of Santa Barbara, California, to pay to said First Presbyterian Church certain sums by them subscribed"; that the other members paid their subscriptions and that the Church expended the money in reliance upon Marwick's promise. The Answer then alleges that the trust indenture and the deed were given pursuant to the above pledge agreement.

It will be observed that the issue thus presented by the appellant in its Answer is in conformity with a pledge agreement of the type referred to in the trust indenture and has no apparent connection with the oral pledge referred to in the testimony of George W. Wilson. Wilson

refers to a meeting in January of 1927 and to a subscription or pledge to pay off indebtedness of the Church [Tr. p. 77]. The Answer and the trust indenture apparently refer to a pledge "prior to the 28th day of November" which was made "for the reconstruction of the house of worship". The logical conclusion is that either Wilson's memory was bad or that the subject matter of his testimony had no connection with the transfer of the property involved in this action, and this was the conclusion of the trial court [Memorandum of Conclusions and Minute Order, Tr. pp. 21 and 22].

B. The declaration of trust contains no unqualified promise to pay money. As stated, this document is Defendant's Exhibit B, and is contained in the Clerk's Transcript on pages 82 and 83. It recites that Marwick has theretofore agreed to pay $25,000.00 but adds that this agreement was conditional. It contains none of the facts required by law to support a binding pledge agreement.

C. Aside from what has been said above, Wilson's testimony falls far short of establishing an enforceable subscription agreement. The law of the State of California is clear on this matter.

A general discussion of California law on this subject is contained in Volume 23 of California Jurisprudence commencing at page 953.

Of all the cases decided in this state on the subject matter of the validity of subscriptions, the one in which

the facts most closely correspond to the instant case is *Board of Home Missions, etc., v. Manley,* 129 Cal. App. 541, 19 Pac. (2d) 21. In this case an action was filed against the executrix of an estate which was based upon a written subscription which contained an unqualified promise to pay. The opinion of the Court states that it is the general rule that a promise to pay a subscription is ordinarily a mere offer which, in the absence of a consideration, may be withdrawn at any time before acceptance. It further states that acceptance "can only be shown by some act on the part of the promisee whereby some legal liability is incurred or money expended on the faith of the promise". In the case now before the Court there was obviously no evidence whatever that any legal liability was incurred or money expended on the faith of Marwick's alleged promise. The above quoted case, however, goes on to point out that there is an exception to the rule above quoted, where there is a mutual promise by several individuals to contribute to the payment of an aggregate sum. The case then points out that other individuals concurred with the deceased in making subscriptions and the following language, which counsel for appellee consider to be of distinct importance, appears:

> "However, as these subscriptions were not for the payment of an aggregate sum to be used for a specified purpose upon which appellant had incurred any obligation or expense prior to the death of deceased, they cannot be said to be mutual promises sufficient to constitute a consideration for her subscription."

The instant case falls far short of meeting the above requirements. Appellant incurred no obligation and expended no money on the strength of Marwick's alleged subscription.

In support of its contention that an obligation existed, appellant cites two California cases as follows:

> *First Trust and Savings Bank v. Coe College,* 8 Cal. App. (2d) 195. In this case the written subscription agreement contains the following language: "But also that it may be used in securing gifts from others to the same objects."

The opinion of the Court points out that the evidence shows that the note was so used and the opinion also points out that the College accepted the offer of the subscriber by acting upon it and thereby supplying the necessary consideration. The *Coe College* case in no way overrules the case of *Board of Home Missions, etc., v. Manley, supra,* but expressly confirms it, by citing it as authority for the proposition that a subscription which is not accepted or acted upon in any way and which is not one of many making up an aggregate sum, is a mere offer to make a gift, and is revoked by the death of its maker.

The other California case relied upon by appellant is *University of Southern California v. Bryson,* 103 Cal. App. 39. In this case the necessary consideration was held to have existed because there were reciprocal promises to pay a definite and fixed amount of money and because the University accepted the offer by incurring

expenses because of it. It is interesting to note that the Court in arriving at its conclusion distinguishes the case from the previous case of *Grand Lodge, etc., v. Farnham,* 70 Cal. 158, by pointing out that in the *Grand Lodge* case, although there were a number of subscriptions, the subscription in question was not conditioned upon the raising of any specified fund, and the Grand Lodge did not act in reliance upon the fulfillment of the pledge.

The point of distinction then between the cases where the subscription is held to be a valid promise and where it is not, is that in order to be a valid promise either the charitable institution must have performed some act such as incurring an indebtedness which it would not have incurred had it not been for the subscription, or where the subscription agreement specifically provides that a number of subscribers, each in consideration of the subscription of the other, agree to raise a specified sum. Neither of these conditions was present in the Marwick case.

Another way to determine the matter here involved is to consider this question: Could the appellant on or after November 28, 1927, (the date of the declaration of trust) have maintained an action against Marwick for the sum of $25,000.00, or any other similar sum, based upon the allegations in appellant's answer and upon the evidence submitted to the trail court? Appellee respectfully submits that, under the above authorities, there was a complete failure on the part of appellant to prove that it had such a cause of action against Marwick.

II.

The Declaration of Trust Was Not a Valid Transfer of the Property in Question.

This subdivision is in response to the argument of appellant, commencing on page 9 of its opening brief.

A. Section 1624 of the Civil Code of the State of California provides that real property can be sold only by an instrument in writing. We must therefore examine the terms of the trust indenture to see if it contains any words which could reasonably be construed to transfer the property in question. The important provisions of the trust indenture are "that I own and hold said property in trust for and as security for the payment of said sum of $25,000.00 to the First Presbyterian Church of Santa Barbara and that in the event of my death prior to paying said sum of $25,000.00 or in the event of my failure to pay the same within ten years from date hereof then said First Presbyterian Church of Santa Barbara shall take record title to said property and be the sole owner thereof and I shall relinquish all claims whatsoever thereto." It appears very certain to counsel for the appellee that nowhere in this language can be found any intention on the part of Marwick to then and there convey, grant or transfer the property in question to the Church. Grant deeds and other forms of deed are easily obtainable and had it been the intent to execute a deed, this would undoubtedly have been done. On the contrary, however, the instrument itself negatives any idea of a present conveyance because of the recital that Marwick wishes the sum of $25,000.00 to be a "charge" against the property. Furthermore, the document was not recorded until March of 1932 and during the time between its date and its recordation, it appears to have been in the possession of

Mr. Schauer, who was the attorney for Marwick, although it is true that Mr. Schauer testified that he likewise handled the transaction for appellant. In any event the document itself recites that it is left in the possession of Messrs. Schauer and Ryon for the purpose of carrying it into effect; which precludes, in the opinion of counsel for appellee, any present intention to either transfer the title, or deliver the document to the appellant. Furthermore, Plaintiff's Exhibit 3 [Tr. p. 58], the letter from Mr. Schauer to Marwick, which letter refers to the trust indenture, indicates it was the intention of the parties that title to the property be transferred in March of 1932 rather than in 1927. In addition, the deed [Plaintiff's Exhibit 2, Tr. p. 62] places a construction on the trust indenture in the first recital which states that the trust indenture was intended to be security and describes it as imposing a lien on the real property therein and hereinafter described. Again it is necessary to turn to the pleadings to determine the theory of appellant as advanced in the trial court. In paragraph II of its Answer [Tr. p. 14] appellant alleges "That thereafter, upon the said 28th day of November, 1927, the said James Marwick, to secure the payment of said promise by him made, to pay said sum of $25,000.00 to said defendant, did make, execute and deliver to said defendant a certain deed of trust, a copy of which said deed of trust is hereto attached and made a part hereof as 'Exhibit A'; that said deed of trust was duly recorded in book 262, page 267, of the Official Records of the County of Santa Barbara, State of California, on the 24th day of March, 1932; that by the terms of said deed of trust said James Marwick did irrevocably transfer and assign said real property described in said paragraph III unto said defendant as

security for the payment of said sum of $25,000.00." It will thus be observed that the position of appellant has been that the trust indenture, or as it is sometimes referred to, the deed of trust, was intended as security, in the sense that a mortgage or trust deed is customarily given as security, and not as an outright transfer of the property. In view of all of these circumstances, appellee submits that the evidence could not possibly support a finding of fact that the property was transferred or conveyed to the appellant by virtue of the terms of the deed of trust.

B. The trust indenture did not create a valid lien or encumbrance against the property.

Section 2924 of the Civil Code of the State of California provides as follows:

> "Every transfer of an interest in property other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage."

Regardless of insolvency or existing creditors, a mortgage on real property, or a trust deed of the type commonly given as security in the State of California, is void unless supported by a consideration.

17 *Cal. Juris.*, p. 710, contains the following statement of law, well supported by authority:

> "The doctrine is established in California that a mortgage or mortgage lien is a mere incident of the debt or obligation which it is given to secure. The debt, note or other obligation is the principal thing, the duty to pay or perform it is none the less binding because it is secured by mortgage. The mortgage has no existence independent of the thing secured by

it. The debt and mortgage are inseparable; the latter must follow the former; and as distinct from the debt, the mortgage has no determinate value and is not a subject of transfer."

In volume 25, *Cal. Juris.*, p. 36, it is said:

"A trust deed given without consideration is of no force or effect."

It is apparent from the above statements of law that the Court could find that the trust indenture in this action created a valid lien only if it finds that at the date of its execution there was a debt due from Marwick to the appellant. We believe we have heretofore shown that there was no such debt due.

C. The trust indenture did not of itself create an obligation against Marwick in favor of appellant. In addition to what has been said before on this point, we again desire to closely examine the provisions of the trust indenture. It recites that Marwick has heretofore agreed to pay to appellant the sum of $25,000.00, but it goes on to say that this agreement was conditional upon Marwick's being able to sell certain real property not involved in this action, and that he has not been able to sell the property. At no other place does the document contain an unqualified agreement to pay money. Even though, however, such a promise be implied from the document it is no more than a promise to make a gift in the future and, as such, is unenforceable.

Wisler v. Tomb, 169 Cal. 382.

The most favorable construction possible to the appellant of the deed of trust is that it contained a promise by Marwick that he would in the future either pay a specific sum of money or transfer the title to the property involved. Inasmuch as this promise was not based upon a valuable consideration, under the above authority it is "of no legal consequence".

D. The trust indenture did not create an enforceable trust. On page 11 of its brief appellant argues that an enforceable trust was created and cites three cases in support of its contention. We believe the case of *In re Lamb,* 61 Cal. App. 321, cited by appellant, supports the theory of the appellee rather than that of appellant, and we therefore quote from this case as follows (italics ours):

> "True, it is not essential that the creator of a trust should constitute a third person trustee and transfer the legal title to him. It is well settled that one may create a trust in his own property by constituting himself a trustee, *provided his words or acts clearly and unequivocally denote an intention to hold the property henceforth as trustee for the benefit of another;* * * * but even so it still is necessary that there be specific property to be held by the settler as trustee, *and an absolute parting by him with that beneficial interest which had been his up to the declaration of the trust.*"

In connection with the above-quoted case we again point out that, by the terms of the trust indenture, Marwick did not absolutely part with his title to the property. In the case of *Lynch v. Rooney* the facts are quite different from those now before this court. The principal case relied upon by appellant, however, is the case of

Wight v. Street, 3 Cal. (2d) 146, 44 Pac. (2d) 322. There is a certain superficial resemblance between this case of *Wight v. Street* and the instant case. A careful reading of the case, however, will show that the following differences exist:

1. The letter creating the trust in the *Wight* case says "it being held in trust by me for her until she and I agree on a time for the transfer to her." The Marwick trust indenture does not recite that Marwick holds the property in trust for the First Presbyterian Church; it states that he holds the property "in trust for and as security for the payment of said sum of $25,000.00 to the First Presbyterian Church." There is a vast difference between property pledged as security for a debt and property presently transferred in trust with intent that title shall then and there pass.

2. The Marwick trust provides that the property will be transferred at some future date or time, to-wit,

> "that in the event of my death prior to paying said sum of $25,000.00 or in the event of my failure to pay the same within ten years from date hereof, then said First Presbyterian Church of Santa Barbara shall take record title to said property and be the sole owner thereof, and I shall relinquish all claims whatsoever thereto."

This language indicates the transfer shall take place, not at the date of the instrument, but either ten years thereafter or at the time of Marwick's death, neither of which time or event had expired or happened on the date of Marwick's adjudication as a bankrupt. At the date of the deed (Plaintiff's Exhibit 2) Marwick, therefore, was the owner of the property.

3. As has been shown above, the theory of the instant case as presented to the trial court was that, by the terms of the trust indenture, the property in question was made security for a debt and was not, in itself, transferred in whole or in part. In other words, had Marwick paid off the $25,000.00 the appellant would have had no claim to the property and no such situation as this existed in the case of *Wight v. Street.*

4. The deed (Plaintiff's Exhibit 2) also lays a construction upon the trust indenture. It recites [Tr. p. 63]:

> "Whereas said James Marwick * * * heretofore made a pledge * * * which pledge was secured by an instrument dated November 28, 1927, * * * imposing a lien on the real property therein and hereinafter described."

This is a further absolute indication that no present trust was intended by the parties, but that the only intent was that a lien be created.

If we did not feel that the case of *Wight v. Street, supra,* was so different in its facts from the instant case we would undertake to show that it is not good law. We feel that this argument, however, is unnecessary except to observe that the opportunity for fraud is great and that under its authority any person who intends to engage in an enterprise which might prove hazardous could execute such a document as that described in *Wight v. Street* in favor of his children. He could then retain the document, undelivered to anyone, and if things went well for him, it could be destroyed. If he became involved the claims of his creditors could be avoided.

III.

This Action Was Not Barred by the Statute of Limitations.

A. Section 338 of the Code of Civil Procedure, quoted on page 12 of appellant's brief, clearly states that a cause of action for relief based on fraud does not accrue until discovery of the fraud. As stated by appellant in its statement of facts, Mrs. Marie Scheinman's claim against Marwick arose out of a promissory note dated December 1, 1927, was properly proved in the bankruptcy proceedings herein involved, and has never been paid. The trustee in bankruptcy, appellee herein, therefore succeeds to her rights. The evidence affirmatively showed that she first learned of this transfer about a year before Marwick was adjudged a bankrupt. Appellant admits all of the foregoing, but contends that the recordation of the trust indenture and the deed were constructive notice to Marwick's creditors and it is only this proposition of constructive notice that need here be argued. On pages 14, 15 and 16 of its brief appellant cites several cases in support of its theory that the recording of these documents was constructive notice to Marwick's creditors. Counsel for appellee have read these cases and find that they are not in point and, as we understand it from the language appearing on pages 16 and 17 of appellant's brief, appellant contends there are no cases on the exact point decided by the appellate courts of the State of California. Counsel for appellee have found no cases holding that the recording of a document is of itself notice to all the world of its contents. It is to be observed that there are many counties in the State of California and no one would expect a creditor who, as far as the record discloses, did not know that Marwick owned property in

Santa Barbara County, to go from county to county to ascertain whether or not a transfer of property had been made. Aside from this theoretical argument, however, we believe the case of *Krause v. Marine Trust & Savings Bank,* 93 Cal. App. 681, 270 Pac. 246, disposes of the question here under discussion. The case says:

> "The public record of any instrument which is by law required to be recorded or which is entitled to be recorded is constructive notice only as to *subsequent* purchasers or interested parties. A prior purchaser or interested party is not affected thereby."

The above case also cites Section 1213 of the Civil Code and 22 *Cal. Juris.* 616. Attention is also called to the case of *Karns v. Olney,* 80 Cal. 90, 22 Pac. 57. This case, in discussing the case of laches, says:

> "The court finds that the deeds bringing the title down to the respondent were recorded immediately after their execution, and were constructive notice to the appellant. Conceding this, it makes the effort to mislead the appellant only the more apparent; but the doctrine of constructive notice has application only to a subsequent purchaser or incumbrancer, and can have no bearing on the question presented here."

In view of the foregoing authority we submit that the recording of the trust indenture and the deed gave no notice which could commence the running of the statute of limitations of the State of California.

If the statute had not run on the date of Marwick's adjudication in bankruptcy (four years after the recording of the deed and trust indenture), it would not run until two years after the closing of the bankrupt estate.

Hansen v. California Bank, 17 Cal. App. (2d) 80, 61 Pac. (2d) 794.

IV.

Regardless of All That Has Been Heretofore Said, the Transfer From Marwick to Appellant Was Actually Fraudulent and Therefore Void Without Without Regard to Insolvency.

This proposition is ignored by appellant in its brief except for the statement contained on page 6 thereof that the court determined that the deed was not actually fraudulent. The only substantiation for this statement is the fact that the trial court allowed appellant a lien on the property for taxes advanced by it. However, the memorandum opinion of the trial court, commencing on page 20 of the clerk's transcript, and with particular regard to page 24, states as follows:

> "Thus it appears that the defendant Church accepted the conveyance of the property in question with the knowledge of the fact that Marwick was then indebted to certain creditors and that he was unable to pay such debts, and that, by accepting said conveyance, the Church would aid in preventing these creditors from collecting what was owing to them."

Furthermore, this opinion was followed by formal findings of fact and conclusions of law. Paragraph V of the findings of fact [Tr. p. 30] states that the deed was received by appellant "with intent to hinder, delay and defraud the creditors of the said Marwick". In view of this finding, which is not attacked in this appeal, the question of insolvency would be immaterial, and the transfer is void as against all creditors and their successors in interest. Section 3439 of the Civil Code of the State

of California as it existed at the time this action was commenced and at the time of the transfer provides as follows:

> "Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

Under the foregoing provision of law, if there is actual intent to hinder, delay and defraud creditors, the question of consideration is immaterial. The case of *Benson v. Harriman,* 55 Cal. App. 483, 204 Pac. 255, states as follows:

> "Moreover, the rule in this state is that, if a conveyance is made with intent to defraud creditors it is void, notwithstanding the debtor has other property ample in amount to satisfy his creditors."

The same rule of law is contained in the following cases:

Swinford v. Rogers, 23 Cal. 233;

Atkinson v. Western Development, 170 Cal. 503;

Cioli v. Kenourgios, 59 Cal. App. 690.

The letter written by Mr. Schauer to Marwick [Plaintiff's Exhibit 3, Tr. p. 58] is positive evidence of the intent, both on the part of appellant and on the part of Marwick, to hinder, delay and defraud Marwick's existing creditors. It will be observed that this letter is an integral

part of the transfer inasmuch as it contains specific instructions for the execution of the grant deed and related specifically to the deed of trust, neither of which had been theretofore recorded. Counsel for appellee urge that this letter, standing alone and without any other evidence as to the transaction involved, compels a finding that an attempt to hinder, delay and defraud Marwick's creditors was the very basis of the transaction here attacked and inevitably leads to a judgment for the appellee.

Conclusion.

It is to be observed that in its statement of points on appeal [Tr. p. 94] appellant adopts its statement of points made to the District Court [Tr. p. 39]. Only three points are made, and they have been considered above. No exception has been taken to the findings of fact of the trial court, which include, as above stated, the finding that the transfer in question was actually fraudulent. Furthermore, no specific exception has been made to finding No. 3, which recites that Marwick owned the real property in question on and prior to March 26, 1932. It is true that appellant has argued that the declaration of trust was a transfer, but counsel for appellee believe that is not a sufficient exception to the finding in question. It is appellee's position, therefore, that

1. At no time was there a debt due from Marwick to appellant and therefore there was no consideration for the transfer.

2. The trust indenture was, at the most, an attempt to cause property to be given as security for a debt which was not in existence, and the trust indenture was therefore of no effect.

3. The action was not barred by the statute of limitations.

4. Regardless of whether the transfer was made while Marwick was solvent or insolvent, and regardless of consideration, the transfer was void as to appellee because of the actual fraud involved.

5. The specific findings of fact above referred to amply support the judgment, and these findings have not been properly attacked and have not, in any event, been shown to be erroneous.

Respectfully submitted,

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